

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S LICENSE NO. 03243
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Erik H. ERIKSON

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2086

Erick H. ERIKSON

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 5 April 1976, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, suspended Appellant's license and all other documents for 1 month outright plus 2 months on 12 months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as operator on board the United States M/V PIONEER under authority of the license above described, on or about 27 January 1976, Appellant "did wrongfully lose control of (the) vessel's tow, the barge 'BARGE 412', allowing it to collide with the U.S. Army Corps of Engineers' survey boat CARLSON moored at the U.S. Army Corps of Engineers' Depot Dock, Hutchinson Island," Savannah, Georgia.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence eleven exhibits and the testimony of four witnesses.

In defense, Appellant offered in evidence one exhibit, and the testimony of three other witnesses plus his own testimony.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. The Judge then served a written order on Appellant suspending all documents, issued to Appellant, for a period of 1 month outright plus 2 months on 12 months' probation.

The entire decision and order was served on 12 April 1976. Appeal was timely filed on 16 April 1976.

FINDINGS OF FACT

On 27 January 1976 Appellant was serving as operator on board the M/V PIONEER and acting under authority of his license while navigating the Savannah River, Savannah, Georgia. The M/V PIONEER is a diesel powered uninspected towing vessel 127 feet in length, 36.5, feet in breadth, and 10.8 feet deep, of 199 gross tons and 9,000 horsepower. On 27 January 1976 the PIONEER was made up to a tow consisting of the barge "BARGE 412" which is 400.1 feet in length, 99.6 feet in breadth, and 19.1 feet deep. The 412 is used principally to move truck trailers from the continental U.S. to Puerto Rico. The 412 was at the PIONEER'S stern, attached by a hawser of 2-5/8 inch cable, with 2 vessels being about 120 feet apart. The 412 had fixed skegs, no fixed rudder, a flat bottom with no keel, and no propulsion of its own.

Just prior to 1930 hours on 27 January, the 412 was moored to dolphins at the Savannah Machine and Shipyard piers 7 and 8, having just undergone repairs at the shipyard. The PIONEER had been hired to tow the 412 from the shipyard to Jacksonville. The PIONEER was to be assisted in undocking to the 412 by the tug FRANK W. SPENCER, which for that purpose was secured to the barge's starboard quarter. The PIONEER and SPENCER, both operating on the orders of Appellant, turned the 412 out into midstream, and the SPENCER assisted in bringing the 412 in line behind the PIONEER, so that the PIONEER and 412 were facing downriver, in an easterly direction.

Once the PIONEER and 412 were properly aligned for towing, the Appellant instructed the SPENCER to let go her lines, at about 2020 hours. The PIONEER and 412 proceeded downriver at about 4 to 5 knots, without incident, for the next 10-12 minutes. The weather was clear and normal, with a wind of 15-20 knots from the northwest to west-northwest, and there was an ebb tide of about 2 knots.

At about 2030 hours, the port quarter of the 412 took a sheer to port, toward the depot dock where the Army Corps of Engineer's survey boat CARLSON was moored, and struck the CARLSON, resulting in extensive damage to that vessel. There was no evidence of any superior force of the elements just prior to the collision, nor was there any evidence of mechanical failure attributable to the 412 or the PIONEER just prior to the collision. Following the collision, Appellant regained control of the 412, reported the casualty to the Coast Guard by radio, alerted downriver traffic that he was having some difficulty, and proceeded downriver without further incident.

BASES OF APPEAL

This appeal has been taken from the order of the Administrative Law Judge. Appellant urges, inter alia, that the Administrative Law Judge erred in finding Appellant's actions "wrongful" or negligent, or in breach of any duty. As my

determination on this issue is dispositive of the case, the other issues raised on appeal will not be discussed herein.

APPEARANCE: Toole, Taylor, Moseley and Milton, Jacksonville, Florida, by James F. Moseley, Esq.

OPINION

The standard of care applicable to negligence charges under R.S. 4450 is set out in the regulations at 46 CFR §5.05-20(2), as follows:

"Negligence"...[is] defined as the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances, would not fail to perform.

The Administrative Law Judge's finding of negligence is based primarily on a "presumption" of negligence said to arise when a moving vessel collides with a moored vessel, and secondarily on a finding of specific negligence, based on the Judge's conclusion that a prudent operator, under the prevailing circumstances, would have employed an assisting tug for a longer period of time than did Appellant herein. The Judge also appears to rest his finding of negligence to some extent on his conclusion that the tug and tow were bound to each other by a "short hawser," and the conclusion based thereon that a longer hawser connection might have permitted the barge to move differently and avoid collision.

Appellant has proved evidence to support the conclusion that the hawser rigging used was normal under the circumstances, through testimony in his behalf by crew members experienced in rigging tows under similar circumstances, and by raising the point that the rigging used was consistent with Coast Guard regulations found at 33 CFR § 84.10. I find that the conclusion that the hawser rigging was improper by being too "short" is not supported by the evidence presented, since the Appellant provided competent evidence to the contrary, and that evidence was not rebutted sufficiently by evidence introduced in opposition.

Both the presumption of negligence and the finding of specific negligence rest substantially on the Judge's conclusion that it was imprudent under the circumstances to fail to employ an assisting tug. However, once the presumption was raised by the Investigating Officer's presentation of evidence, the Appellant introduced significant evidence to the contrary, including testimony by

experienced merchant mariners, one of whom is a former Coast Guard Officer with substantial experience in maritime casualty investigations. The testimony in Appellant's behalf strongly supports the conclusion that, given the circumstances facing him in this case, the Appellant acted as would "a reasonably prudent person of the same station, under the same circumstances." See for example the elaborate hypothetical-situation series of questions directed to the Appellant's expert witness, at pages 151-156 of the Transcript herein, and the witness' responses.

As to the finding of specific negligence, the Judge concluded, without providing supporting evidence on the record to define a standard of care, that the Appellant's failure to employ an assisting tug was a breach of some duty. As shown by the evidence Appellant offered at the hearing, there was no law or regulation or local custom which would have imposed a duty on Appellant to employ an assisting tug under the circumstances prevailing at the time the towing operation was undertaken.

Once the Appellant placed in evidence information from which it could be properly concluded that he conducted himself in accordance with the standard of care imposed by Coast Guard regulations, i.e., as would "a reasonably prudent person of the same station, under the same circumstances," the Judge could not properly reach a finding of negligence without evidence in rebuttal to show that Appellant had not in fact met the standard by his actions. The Investigating Officer asked a few questions of the Appellant's witnesses, as did the Judge himself, but, on reviewing these questions and the responses to them, I find that they do not overcome the evidence favorable to Appellant.

My decision in this case turns on essentially the same basis as did my decision in 2080 (FULTON), wherein the government failed to present evidence defining the standard of care to which that Appellant should have been held. As in FULTON, "[t]he only testimony to be found in the record on this issues is favorably to Appellant. The sole expert witness to testify stated that he approved of Appellant's decision....The burden in this case was on the government to show that Appellant,...acted in a manner that was contrary to what a prudent [person] would have done under the same circumstances. This is especially so where there was no allegation that Appellant violated any statute or regulation."

CONCLUSION

Following the reasoning in FULTON, I find that in the present case the government failed to establish by competent evidence that there existed some specific standard of care which the Appellant failed to meet. Further, I find that Appellant, by un rebutted

testimony and evidence, established that he did meet the standard of care imposed by the Coast Guard's regulations. For these reasons, I conclude that the charge of negligence has not been by substantial evidence of a reliable and probative nature, and, therefore, that the order herein must be VACATED.

ORDER

The order of the Administrative Law Judge dated at Jacksonville, Florida, on 5 April 1976, is VACATED.

E. L. PERRY
VICE ADMIRAL, U. S. COAST GUARD
ACTING COMMANDANT

Signed at Washington, D.C., this 3rd day of Dec. 1976.

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Negligence

Defined, 46 CFR 5.05-20 (2), for R. 4450 purposes

Evidence must overcome conclusion that basic standard in regulation has been met, to find charge was proved.

Presumption, without more, will not overcome a showing that basic standard was met

Standard of care

Must define, to support finding that any breach of duty occurred.